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No. 99-1173

In the Supreme Court of the United States

JAMES E. CECIL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board reasonably concluded that an employer does not commit an unfair labor practice when, consistent with the terms of a facially valid union security clause, it advises employees that union "'membership' and payment of 'dues' can be made a condition of employment."

2. Whether, on finding that the union unlawfully failed to notify employees of their legal rights regarding membership and payment of dues, the Board acted within its remedial discretion in ordering the union to reimburse, for dues and fees expended by the union on non-representational activities, those employees who choose objector status upon receiving notification of their rights.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is unpublished, but the judgment is noted at 194 F.3d 1311 (Table). The decision and order of the National Labor Relations Board (Pet. App. 9a-26a) and the decision of the administrative law judge (Pet. App. 26a-57a) are reported at 323 N.L.R.B. 260.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 1999. The petition for a writ of certiorari was filed on January 12, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 7 of the National Labor Relations Act (NLRA or Act) gives employees the right to engage, or "to refrain from" engaging, in activities in support of collective bargaining, such as "join[ing] * * * labor organizations." 29 U.S.C. 157. Sections 8(a)(1) and 8(b)(1)(A) make it unlawful for employers or unions, respectively, to "restrain or coerce" employees in the exercise of their Section 7 rights. 29 U.S.C. 158(a)(1), (b)(1)(A). Section 8(a)(3) prohibits employers from engaging in "discrimination in regard to * * * any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. 158(a)(3). Under Section 8(a)(3), however, an employer and a union may contract to require as a condition of continued employment that bargaining-unit employees maintain "membership" in the union, provided that membership is available to all and that it requires only "tender[ing] the periodic dues and the initiation fees uniformly required." *Ibid.*

This Court has held that, under Section 8(a)(3), "'membership' as a condition of employment is whittled down to its financial core." *NLRB* v. *General Motors Corp.*, 373 U.S. 734, 742 (1963). Only "payment of initiation fees and monthly dues," rather than formal union membership, may be required as a condition of employment. *Ibid.* This Court has also held that employees who are not formal union members may object to paying that portion of dues that supports "activities unrelated to collective bargaining, contract administration, or grievance adjustment." *Communications Workers* v. *Beck*, 487 U.S. 735, 738 (1988). Nonetheless, a union does not breach its duty of fair representation "by negotiating a union security clause that uses the

statutory language [of Section 8(a)(3)] without expressly explaining, in the agreement, the refinements introduced by * * * *General Motors* and *Beck*." *Marquez* v. *Screen Actors Guild*, 525 U.S. 33, 44 (1998).

2. In June 1991, the National Labor Relations Board (Board) certified Teamsters Local 614 (Union) as the exclusive bargaining representative of a bargaining unit of employees at Rochester Manufacturing Company (RMC). At that time, petitioner was an employee in the bargaining unit. Pet. App. 2a, 34a, 43a. In February 1992, RMC and the Union entered into a collective-bargaining agreement containing the following union-security clause:

> The Employer agrees that as a condition of continued employment, all present and future employees covered by this agreement shall become and remain members in good standing in [the Union] no later than the 31st day following the beginning of their employment.

Id. at 28a.

RMC drafted and enclosed with its employees' February 6, 1992, paychecks a document that stated, in pertinent part: "Attached is a Teamsters Union 'Check-Off Authorization' form that must be filled out, which authorizes [RMC] to withhold Union dues from your paycheck. Dues payment is required for your continued employment." Pet. App. 28a-29a. When petitioner and other employees failed to sign and return the authorization forms, RMC's human resources manager, Kris Williamson, gave them a document "remind[ing]" them that "membership in the [Union] (which includes the payment of monthly dues) is a *requirement* for continued employment at [RMC]." *Id.* at 29a. Williamson sent that document to employees based on her "inter-

pretation of the Union's security clause." *Id.* at 33a-34a.

RMC deducted $16 in Union dues from petitioner's February 27, 1992, paycheck but returned the money to him on March 4, because he had not signed the authorization form. Pet. App. 16a n.9, 19a n.12, 30a. Petitioner advised agents of the Union that he was not going to join the Union or authorize dues deductions. *Id.* at 14a n.7. Nonetheless, in March and April, petitioner received letters from the Union asserting that, "still[,] as a condition of employment you must pay such monthly fees to the Union." *Id.* at 32a. At no time did the Union or RMC inform the employees of their rights under *General Motors* and *Beck* to refrain from formal union membership and to object to dues payments other than those that support representational activities. *Id.* at 2a. Petitioner filed unfair labor practice charges against RMC and the Union with the Board in May 1992, but thereafter voluntarily left his employment with RMC. *Id.* at 4a, 26a.

3. Acting on petitioner's charges, the Board's General Counsel issued a consolidated complaint against RMC and the Union that alleged numerous violations of the Act. Pet. App. 26a-28a. The administrative law judge (ALJ) upheld the complaint's allegations. *Id.* at 26a-57a. The Board affirmed in part and reversed in part the ALJ's decision. *Id.* at 9a-26a.

a. The Board determined that RMC violated the Act in "its enforcement of union security." Pet. App. 10a. The Board found that RMC violated Section 8(a)(1) and (3) of the Act, 29 U.S.C. 158(a)(1) and (3), "by advising its unit employees that union-checkoff authorization forms must be signed to retain employment." Pet. App.

20a.[1] The Board also found that RMC violated Section 8(a)(1) by deducting "membership dues from [petitioner's] wages without his authorization." *Id.* at 16a. The Board determined, however, that RMC did not commit an unfair labor practice by advising employees that "'membership' and payment of 'dues' can be made a condition of employment." *Id.* at 15a. The Board explained that "the statute uses the term 'membership,' and payment of dues can lawfully be made a condition of employment." *Ibid.* Further, unlike unions, "employers have no duty of fair representation, and thus they are not under an affirmative obligation to spell out for employees the precise extent of the union-security obligation." *Ibid.*[2]

The Board determined that the Union violated its duty of fair representation under Section 8(b)(1)(A) of the Act, 29 U.S.C. 158(b)(1)(A), by failing to notify employees of their rights under *General Motors* and *Beck*. Pet. App. 20a; see also *id.* at 10a-12a; *Marquez*, 525 U.S. at 43. The Board also found that the Union violated Section 8(b)(1)(A) by threatening petitioner with reprisal "because of his failure to become a full member" and "attempt[ing] to require him to pay full initiation fees and membership dues." Pet. App. 13a-14a.

Finally, the Board found that the union security clause was not facially unlawful. Pet. App. 13a. The

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[1] The Board further found that RMC's conduct "aided and assisted the Union," in violation of Section 8(a)(2), 29 U.S.C. 158(a)(2), which prohibits employers from "contribut[ing] financial or other support to" a labor organization. Pet. App. 15a.

[2] The Board made clear, however, that an employer does violate the Act "if the employer affirmatively gives employees an incorrect message under threatened loss of employment (e.g., payment of dues is insufficient; full membership is required)." Pet. App. 15a n.8.

Board explained that the clause would not "mislead[] employees into believing that full union membership is required" because the Union must "apprise employees of their rights to be nonmembers and * * * apprise nonmembers of their right to pay less than full dues and fees." *Ibid.*

b. As a remedy, the Board ordered RMC to cease and desist from "[a]dvising employees that union-checkoff authorization forms must be signed to retain employment," "[t]hreatening to terminate employees because of their failure to become full members of [the Union]," "[d]educting union membership dues from employees' wages without the employees' written authorization," and coercing employees "[i]n any like or related manner." Pet. App. 21a. The Board ordered the Union to notify the employees of their rights under *General Motors* and *Beck*. *Id.* at 23a. The Board further ordered that, "[w]ith respect to those employees who, with reasonable promptness after receiving their notices, elect nonmember status and make *Beck* objections with respect to one or more of the accounting periods covered by the complaint, * * * [the Union shall] * * * process their objections, nunc pro tunc." *Id.* at 18a. The Union "shall then * * * reimburse the objecting nonmember employees for the reduction in their dues and fees, if any, for nonrepresentational activities that occurred during the accounting period or periods covered by the complaint in which the nonmember employee has objected." *Id.* at 18a-19a.

4. Petitioner sought review of the Board's order in the United States Court of Appeals for the Sixth Circuit. The court of appeals affirmed in an unpublished opinion. Pet. App. 1a-8a.

The court concluded that *Marquez*, which postdated the Board's decision, "effectively eliminates the main

thrust of [petitioner's] argument, to wit, that the union security clause in his [collective bargaining agreement] was facially invalid." Pet. App. 6a. The court explained that, before *Marquez*, it had concluded that a union security clause requiring "membership in good standing" is "inherently misleading and thus invalid" if the collective bargaining agreement does not contain "[a] concurrent definition of that term." *Ibid.* However, the court concluded that its prior reasoning was no longer viable in light of *Marquez*, in which this Court held that contracts that "track[] the statutory language of NLRA § 8(a)(3)" cannot, "standing alone, be grounds for a finding that a union has misled its workers in bad faith and violated its duty of fair representation." *Ibid.*

The court also considered the point made in Justice Kennedy's concurring opinion in *Marquez*—that a union security clause, valid on its face, might be enforced in a manner that breaches the union's duty of fair representation or constitutes an unfair labor practice. Pet. App. 7a.[3] The court concluded that the Board "did precisely what Justice Kennedy's concurrence suggested it should do." *Ibid.* It found "several instances of unlawful coercion and misinformation by the Union and

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[3] In his concurrence, Justice Kennedy (joined by Justice Thomas) explained that the Court had not addressed "circumstances in which there is evidence that a security clause such as this one was used or intended to deceive or injure employees." 525 U.S. at 52. Thus, "inclusion of the statutory language" would be no defense for the union "when a violation of the fair-representation duty has been alleged and facts in addition to the bare language of the contract have been adduced to show the violation." *Id.* at 52-53. "Furthermore, we do not have before us the question whether use of this language, in some circumstances, might be an unfair labor practice even though, without more, it is not a breach of the duty of fair representation." *Id.* at 53.

RMC, motivated in part by those parties' erroneous interpretation of the clause," and it "based its remedy on these specific instances of misconduct." *Ibid.*

The court rejected petitioner's contention that the Board should have ordered the Union to refund to employees "all Union dues paid while the security clause was in effect." Pet. App. 7a-8a. The court explained that, although *General Motors* and *Beck* "substantially circumscribed the amount of dues that objecting employees are required to pay," this Court "has never suggested that employees may exempt themselves entirely from any financial obligation." *Id.* at 8a.

ARGUMENT

The unpublished decision of the court of appeals is correct, and it does not conflict with any decision of this Court or another court of appeals. This Court's review is therefore not warranted.

1. Petitioner concedes (Pet. 15) that, under *Marquez*, employers and unions "are permitted to mimic the statutory language permitting a 'membership' requirement in writing their forced-unionism agreements." Thus, petitioner does not challenge the court of appeals' ruling that the union security clause in this case is facially valid. Instead, petitioner contends (Pet. i (Question 1), 10-16) that this Court's review is necessary to establish that an employer violates the NLRA if, in reliance on such a clause, the employer attempts to force employees to become formal union members. As we explain below, the Board and the court of appeals accepted the principle that petitioner seeks to establish and disagreed with petitioner only as to how it should be applied here. Petitioner's contention thus raises no issue warranting this Court's review.

Based on the record in this case, the Board found that RMC made two representations to employees respecting their obligations under the union security clause: RMC advised employees that they were required as a condition of employment to execute the Union's dues-checkoff authorization forms; and RMC advised employees that "'membership' and payment of 'dues' can be made a condition of employment." Pet. App. 14a-15a. The Board determined that RMC's handling of the dues-checkoff forms violated the Act in several respects. RMC's advising employees to sign the dues-checkoff forms under threatened loss of employment "coerced employees in the exercise of" their Section 7 right not to join the Union, contrary to Section 8(a)(1) of the Act, and discriminatorily "encourag[ed] membership in a labor organization," contrary to Section 8(a)(3). Pet. App. 15a, 20a. RMC therefore also "aided and assisted the Union in violation of Section 8(a)(2)." *Id.* at 15a. The Board further concluded that RMC unlawfully coerced petitioner in his right not to join the Union by withholding union dues from him without his authorization. See *id.* at 16a. The Board therefore issued a broad cease and desist order, which prohibits RMC from coercing employees to "become full members of the * * * Union." *Id.* at 21a.

The Board's decision and order are thus fully consistent with petitioner's proposition (Pet. 10, 11, 16) that an employer cannot lawfully enforce a facially valid union security clause in a manner that coerces employees to become "formal union members." The court of appeals also recognized that principle in affirming the

Board. See Pet. App. 7a (record contained several instances of "unlawful coercion" by RMC and Union).[4]

To the extent petitioner further contends (Pet. 15) that the Board should have deemed unlawful RMC's statement to employees that "'membership' and payment of 'dues' can be made a condition of employment" (Pet. App. 15a), the Board properly rejected that contention. As the Board explained, "the statute uses the term 'membership,' and payment of dues can lawfully be made a condition of employment." Pet. App. 15a; see 29 U.S.C. 158(a)(3). "The relevant provisions of § 8(a)(3) have become terms of art; the words and phrasing of the subsection now encompass the rights * * * announced in *General Motors* and *Beck*." *Marquez*, 525 U.S. at 46. Just as a union does not breach its duty of fair representation by negotiating with the employer a union security clause that uses the statutory language, *id.* at 43-44, the employer does not "coerce" or discriminatorily "encourage" employees to join the union, in violation of Sections 8(a)(1) and 8(a)(3), by reiterating the terms of that clause to employees.

Moreover, to the extent petitioner contends (Pet. 15-16) that an employer cannot lawfully apply a facially valid union security clause without simultaneously explaining to employees their rights under *General Motors* and *Beck*, that contention is also without merit. It cannot be squared with *Marquez*'s holding that a

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[4] Accordingly, there is no merit to petitioner's contention (Pet. 11) that the decision of the court of appeals allows employers "to **en**courage collective activities," thereby creating a "conflict" with other court decisions (Pet. 11-13) involving "the vigorous prosecution of employers **dis**couraging employee collective activities." As discussed in the text above, the Board found that RMC unlawfully encouraged employees to join the Union in applying the union security clause, and the court of appeals affirmed the Board.

union security clause that tracks the statutory language is valid and capable of being enforced as written. See 525 U.S. at 46. Moreover, requiring the employer to notify its employees of their *General Motors* and *Beck* rights is unnecessary because the union is obligated to notify employees of those rights. See Pet. App. 10a-12a; *Marquez*, 525 U.S. at 43. Finally, there is no statutory authority to place a notification duty on the employer, because, unlike the union, the employer is not subject to a duty of fair representation. See Pet. App. 15a.[5]

2. Petitioner next contends (Pet. i (Question 2), 17-22) that the Board should have ordered the Union to refund to employees all fees and dues collected from them under the union security clause. That contention rests on the incorrect premise that RMC and the Union entered into "an illegal forced-unionism obligation" (Pet. 19) in this case. From that premise, petitioner argues (*ibid.*) that the Board should have expunged the union security clause, thereby removing "any legal basis for forcing RMC employees to subsidize **any** of [the Union's] activities." But the Board and the court of appeals rejected that premise when they concluded that the union security clause in this case was facially valid (a conclusion that petitioner does not directly challenge). Pet. App. 6a, 13a. Although RMC and the Union enforced the valid clause in an unlawful manner,

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[5] As the Board noted in its decision, however, an employer does violate the Act if it "affirmatively gives employees an incorrect message under threatened loss of employment," such as by informing them that they are required to become formal union members. See note 2, *supra* (citing Pet. App. 15a n.8).

expunction of a valid contractual provision is not an appropriate remedy for such a violation.[6]

The Board's order requires the Union to notify RMC's employees of their rights under *General Motors* and *Beck*, and then to reimburse those employees who elect nonmember status and file objections for any dues and fees expended by the Union for nonrepresentational activities during the accounting periods covered by the complaint. Pet. App. 18a-19a. The Board reasonably concluded that this remedy was the most appropriate way to restore the status quo ante, because the Board could not feasibly "determine in hindsight" the choices that individual employees would have made if they had been timely notified of their rights. *Id.* at 18a. The court of appeals properly afforded deference to the Board's choice of remedy. See *NLRB* v. *J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 265 (1969) (Board acts within its discretion when it fashions "remed[ies] designed to restore, so far as possible, the status quo that would have obtained but for the wrongful act"); *ABF Freight System, Inc.* v. *NLRB*, 510 U.S. 317, 324 (1994) (Board's remedial views "merit the greatest deference").

There is no merit to petitioner's contention (Pet. 17-18) that the Board's remedial order in this case "in essence re-writes the RMC/Local 614 contract to

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[6] The authorities cited by petitioner (Pet. 18-19) address appropriate remedies when a contractual or other provision is found to be facially unlawful. See, *e.g.*, *IAM Local Lodge 1414 (Neufeld Porsche-Audi, Inc.)*, 270 N.L.R.B. 1330, 1337 (1984) (ordering union to expunge a constitutional provision that unlawfully restricted employees' right to resign from membership); *Universal Fuels, Inc.*, 298 N.L.R.B. 254, 257 (1990) (ordering employer to expunge from collective bargaining agreement an overbroad definition of "just cause" for discipline).

impose a 'lesser' form of forced unionism," contrary to *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970). In *H.K. Porter*, this Court concluded that, in fashioning remedies for unfair labor practices, the Board "is without power to compel a company or a union to agree to any substantive contractual provision of a collective-bargaining agreement." *Id.* at 102. Here, however, the Board's remedy neither "rewrites" the parties' agreement nor imposes any contractual terms upon RMC or the Union. Rather, the Board's order leaves in place the facially valid union security clause. See Pet. App. 20a-26a.

Nor is there merit to petitioner's argument (Pet. 21) that the Board's remedy gives unions insufficient "incentives to comply with the law" because, under the Board's order, unions are permitted "to retain that portion of monies to which they would have been entitled had they not defied the legal requirements to provide notice and full disclosure to employees." As this Court has explained in a similar context, "no decree would be proper which appeared likely to infringe the unions' right to expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining." *Railway Clerks* v. *Allen*, 373 U.S. 113, 122 (1963). Petitioner's proposed remedy would do precisely that by depriving the Union of dues to which it has a right under the Act and which are necessary to support its collective bargaining activities.[7]

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[7] See *Gilpin* v. *AFSCME*, 875 F.2d 1310, 1314-1315 (7th Cir.) (a proposed remedy that would have required union to refund money "necessary * * * to defray costs properly incurred by the union in representing nonmembers in collective bargaining" would be "a severely punitive remedy * * *, not one properly described as restitution at all"), cert. denied, 493 U.S. 917 (1989).

In short, the decision of the court of appeals properly implements the principles recently expounded by this Court in *Marquez*. The petition presents no reason why this Court should undertake to duplicate that effort.

3. Finally, this Court's review in this case is particularly unwarranted because resolution of the issues raised by the petition would be of no practical significance to petitioner. After filing charges with the Board, petitioner voluntarily left his employment with RMC; the $16 that was withheld from his paycheck was returned to him in March 1992; and RMC and the Union have removed the "membership in good standing" language from the collective bargaining agreement (although they were under no legal compulsion to do so). See Pet. App. 4a, 16a n.9, 19a n.12, 30a. Under those circumstances, petitioner does not retain an adequate stake in further litigation of the issues that he has raised. See *Spencer* v. *Kemna*, 523 U.S. 1, 7 (1998) ("Parties must continue to have a 'personal stake in the outcome' of the lawsuit" "through all stages of federal judicial proceedings.").[8]

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[8] The court of appeals nonetheless concluded that the case is not moot. The court reasoned that petitioner is effectively acting as the class representative of the rest of the employees in the RMC bargaining unit, even though the case has never been certified as a class action. See Pet. App. 4a-5a & n.1. But see *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. 424, 430 (1976) (formal certification as class action necessary). Whether or not the conclusion of the court of appeals is correct, this Court should await a case in which the petitioner retains a significant interest in the outcome to address any issues raised by the petition that warrant review. Cf. *Baker* v. *Carr*, 369 U.S. 186, 204 (1962) (personal stake in outcome of controversy "assure[s] that concrete adverseness which sharpens the presentation of issues").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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